A

Re Biaxis (M) Sdn Bhd

B HIGH COURT (PENANG) — ORIGINATING SUMMONS NO PA-28JM-2–11 OF 2019
WONG HOK CHONG JC
12 AUGUST 2020

C *Companies and Corporations — Judicial management — Applicant applied for judicial management order — Opposition of application by secured creditor — Whether judicial management order would likely achieve survival and/or better realisation — Whether judicial management order ought to be allowed*

D This was an application by the applicant for a judicial management order pursuant to the Companies Act 2016. Maybank, a secured creditor, was appearing to oppose the application. The court must dismiss the application unless it considered that public interest required that the judicial management
E order be made.

Held, dismissing the application:

(1) The 'public interest' alleged by the applicant pertained to the loss of employment, uncompleted contracts, etc were generic to wound up
F companies and was far from being public interest. There was nothing special about the applicant such that public interest required the judicial management order to be made (see paras 35–36).

(2) The applicant had come up short in their evidence to support the
G application for a judicial management order. The nominated judicial manager had not affirmed an affidavit to support the application. There was thus no satisfactory explanation on the rationale of the proposal and how it would achieve the goals. There was nothing credible before the court for it to even consider that the proposal was likely to achieve its
H goals. The applicant had not put forth a tangible proposal. The letter of intent and a draft indicative term sheet were both vague, speculative and scant on details. There was no satisfactory explanation of the rationale of the proposal and how the proposal would achieve better realisation (see paras 46–49 & 54).

I **[Bahasa Malaysia summary**

Ini adalah permohonan pemohon untuk mendapatkan perintah pengurusan kehakiman menurut Akta Syarikat 2016. Maybank, pemiutang bercagar, menentang permohonan tersebut. Mahkamah harus menolak permohonan itu

melainkan ia menganggap kepentingan awam memerlukan perintah pengurusan kehakiman dibuat.

Diputuskan, menolak permohonan:

(1) 'Kepentingan awam' yang didakwa oleh pemohon berkaitan dengan kehilangan pekerjaan, kontrak yang tidak dilengkapkan dan lain-lain adalah generik kepada syarikat yang digulung dan jauh daripada kepentingan awam. Tiada apa-apa yang istimewa tentang pemohon sehinggakan kepentingan awam memerlukan perintah pengurusan kehakiman dibuat (lihat perenggan 35–36).

(2) Pemohon telah kekurangan dalam keterangan mereka untuk menyokong permohonan bagi perintah pengurusan kehakiman. Pengurus kehakiman yang dicalonkan tidak mengesahkan afidavit untuk menyokong permohonan itu. Oleh itu, tiada penjelasan yang memuaskan tentang rasional cadangan itu dan bagaimana ia akan mencapai matlamat. Tiada apa-apa yang boleh dipercayai di hadapan mahkamah untuk mempertimbangkan bahawa cadangan itu mungkin mencapai matlamatnya. Pemohon tidak mengemukakan cadangan yang nyata. Kedua-dua surat niat dan draf lembaran terma indikatif adalah tidak jelas, spekulatif dan kurang terperinci. Tiada penjelasan yang memuaskan tentang rasional cadangan dan bagaimana cadangan itu akan mencapai realisasi yang lebih baik (lihat perenggan 46–49 & 54).]

Cases referred to

Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473, HC (refd)

Legislation referred to

Companies Act 2016 ss 366, 403, 404, 405(1), (3), (4), (5)(a), 406(1), 409, 410, 411(4), 420, 420(1), 421(2), (3), (5), 423(1), Part III, Division 8, Subdivision 2

Companies (Corporate Rescue Mechanism) Rules 2018 rr 9, 13(1)(b), Part III

Brian Foong Mun Loong (Chooi & Company + Cheang & Ariff) for the applicant.
Ng Sai Yeang (Raja, Darryl & Loh) for the creditor.

Wong Hok Chong JC:

APPLICATION

[1] This is Biaxis (M) Sdn Bhd's ('applicant') application for a judicial management order ('JMO') pursuant to the Companies Act 2016 ('the CA').

A JUDICIAL MANAGEMENT PROVISIONS

[2] As the judicial management provisions are relatively new — they only came into force on 1 March 2018 — I thought it helpful to set out a broad framework of judicial management process that are relevant to this application. The statutory provisions for judicial management are found at ss 403–430 of the CA and the corresponding rules at rr 9–37 of the Companies (Corporate Rescue Mechanism) Rules 2018 ('the Rules').

C OVERALL PURPOSE

[3] The overall purpose of judicial management is to temper the winding up of insolvent companies where the circumstances allow for a better outcome for the creditors and/or the company.

D MECHANISM

[4] The mechanism is to instate a moratorium on legal proceedings against the company and afford a court appointed judicial manager the opportunity to make a proposal to the creditors for the settlement of debts and/or the survival of the company.

PROPOSAL — APPLICANT'S CONSIDERATION

[5] The legal process begins with the filing of the judicial management application. There are pre-conditions before an applicant may file a judicial management application, namely, the applicant must consider that (s 404 of the CA):

(a) the company is or will be unable to pay its debts ('insolvency'); and

(b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern ('survival') or that otherwise the interests of creditors would be better served than by resorting to a winding up ('better realisation').

H FILING OF APPLICATION

[6] Upon the filing of a judicial management application, without anything more, the moratorium on legal proceedings against the company is automatically triggered (s 410 of the CA). Creditors with ongoing legal proceedings against the company will suddenly find them stayed. Unsecured creditors may not oppose the judicial management application (r 13(1)(b) of the Rules).

HEARING OF APPLICATION

[7] The application must be heard within 60 days of the filing of the application (r 9 of the Rules). Although there is no time frame for the delivery of a decision, I think it is implicit that any continued hearing and decision should not be delayed.

PROPOSAL — COURT'S CONSIDERATION

[8] The conditions before a court can make a judicial management order are that (s 405(1) of the CA):

(a) the court is satisfied that the company is or will be unable to pay its debts ('insolvency'); and

(b) the court considers that the making of the order would be likely to achieve one or more of the following purposes:

(i) the survival of the company, or the whole or part of its undertaking as a going concern ('survival');

(ii) the approval under s 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section ('scheme');

(iii) a more advantageous realisation of the company's assets would be effected than on a winding up ('better realisation').

JUDICIAL MANAGEMENT ORDER

[9] When the court makes a judicial management order, the order places the company under the judicial management of a judicial manager and appoints the judicial manager (s 405(3) of the CA). It is valid for six months (s 406(1) of the CA), during which time the moratorium is maintained (s 411(4) of the CA).

PROPOSAL — CREDITOR'S CONSIDERATION

[10] The judicial manager shall, within 60 days of the order, make his proposal to the creditors (s 420 of the CA). It is for the creditors to decide whether to approve or reject the proposal. Unanimity is not required. The approval of 75% of the creditors in value shall bind all the creditors (s 421(2)–(3) of the CA).

PROPOSAL — EXECUTION

[11] If the proposal is approved, the judicial manager shall execute the proposal within six months of the order (s 423(1) of the CA). If not, the order

is set to be earlier dissolved (s 421(5) of the CA).

THE PROPOSAL

[12] Running through the whole judicial management process from the filing of the application, to the hearing of the application and to the voting on the proposal, is the substantive consideration. Although the substantive consideration culminates in the statement of the proposal from the judicial manager to the creditors to vote on (s 420(1) of the CA), they would have been formulated much earlier — at the preparation stage of the application.

EXPERT ADVISOR/NOMINATED JUDICIAL MANAGER

[13] The applicant would not have been able come up with the proposal and consider that there is a reasonable probability of the company's survival or better realisation on their own. They would have engaged an insolvency practitioner — a professional with expertise in corporate insolvency — to come up with and advise them on the proposal from the very outset. The applicant would invariably nominate the same insolvency practitioner to be appointed as judicial manager.

[14] I am of the firm opinion that the application should also be supported by the nominated judicial manager for the following reasons: (a) he is the mastermind behind the proposal and plays a key role throughout the judicial management process; (b) he has the expertise to consider whether the proposal will achieve survival and/or better realisation; (c) he is able to provide an objective view, being a professional without any vested interest in the applicant or company; and (d) for as much as it is applicant's application for a judicial management order, it is also his application albeit indirectly to be appointed judicial manager.

[15] To this end, I think it incumbent on him to affirm an affidavit to support the application. At the very least (though not encouraged), he should prepare an expert report to support the application, to be appended to the applicant's affidavit.

RELIANCE BY APPLICANT AND COURT

[16] Further, it is not only the applicant who have to rely on the expertise of the nominated judicial manager for guidance. The court in considering whether the proposal is likely to achieve survival and/or better realisation, would similarly have to rely on the nominated judicial manager's expertise for guidance. His evidence is thus crucial to the application.

SUBSTANTIVE CONSIDERATIONS

[17] Turning to the substantive consideration, the subject of consideration for the applicant contemplating filing an application and the court making a judicial management order are similar. They pertain to the solvency of the company and the proposal achieving survival and/or a better realisation.

[18] What they differ in is the degree of assurance required for each criteria. For insolvency, the applicant need only consider, whereas the court must be satisfied, that the company is insolvent; and as for survival and/or a better realisation, the applicant need only consider that there is a reasonable probability of achieving, whereas the court must consider it would be likely to achieve, survival and/or a better realisation.

SURVIVAL/BETTER REALISATION

[19] But what do survival and better realisation entail? My understanding of survival is that the proposal will enable the company, either the whole or a part of the business, to survive and be able to meet its financial obligations in full. This is a best outcome scenario. As for better realisation, it is that the proposal will secure better returns for the creditors than if the company was left to be wound up without the proposal, the survival of the company is immaterial. This is a worst outcome scenario.

[20] In practice, I imagine that in the majority of cases the purpose would be a blend of survival and better realisation. In other words, the creditors stand to receive more than if the company were to be wound up and the company survives to continue as a going concern.

SCHEME

[21] There is one more substantive consideration when it comes to the court, that is the scheme. The scheme actually pertains to survival and/or better realisation. It is just that in more complex cases that cannot be accomplished by just the creditor's approval alone, the applicant may seek the creditor's approval for the judicial manager to make a further application under s 366 of the CA for further approvals that are not available under judicial management.

[22] For example, the proposal may also require the shareholders' approval and the applicant can't obtain the requisite shareholders' support, then the applicant may need to rely on s 366 of the CA to bind all the shareholders; or the proposal may in like manner require the approval of different classes of shareholders or different classes of creditors. These are within the contemplation of s 366 of the CA but not judicial management.

A BONA FIDE

[23] I must add, it goes without saying, that the court must be first and foremost be satisfied that the application and the proposal is bona fide (*Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473*)*. Hence, at the other end of the spectrum, if the court finds that the application to be frivolous or vexatious, it may make such orders to redress any injustice that may have been resulted as the court thinks just and equitable (s 405(4) of the CA).

C MEASURED CASE BY CASE

[24] I am mindful that the quality and quantity of evidence one can expect from the applicant and nominated judicial manager will vary from case to case and from circumstance to circumstance. It would also depend on whom the applicant is. For instance, more will be expected where the applicant is the company itself than if it were a creditor, whose access to information will be comparatively limited.

E GUIDING PRINCIPLE ON EXPECTATIONS

[25] Having said that, there must be some core guiding principles. I find the following to be a useful guide: the applicant and/or the nominated judicial manager should:

F

(a) demonstrate that the application and proposal is bona fide;

(b) demonstrate that they have used their best efforts: (i) to gather and verify all the relevant information, especially financial information; (ii) to get the proposal as close as possible to its final form; and (iii) to secure the commitment of parties who are injecting money in the proposal, if any; and identify issues that are still outstanding;

G

(c) explain the rationale of the proposal and how it will achieve its goal within the given time frame;

H

(d) make full and frank disclosure of: (i) material risk that may lead to the creditors ending up in a less advantageous position; (ii) all previous applications for judicial management applications and their respective outcomes; and (iii) any other relevant matters.

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[26] Finally, the applicant should state that they consider that there is a reasonable probability of achieving the goals — this is the pre-conditions for his application; and the nominated judicial manager should state that he

considers the proposal is likely to achieve the goals — this is the very least that he, the expert, would have to say if he is to persuade the court to share his confidence.

EXPECTATIONS FAIR AND MEASURED

[27] I believe that the above guidelines are fair and measured, bearing in mind that: (a) there is an automatic moratorium; (b) there is real risk of mala fide applications to take advantage of the automatic moratorium; (c) unsecured creditors are prohibited from opposing the application; (d) with only 60 days to put the final proposal to the creditors, the proposal on application is expected to be at an advanced stage; (e) the proposal put to the creditors should be essentially the same as that assessed by the court; and (f) the creditors, when voting, are resting on the assurance that the court has assessed the veracity of the proposal and considers it likely to achieve survival and/or better realisation or, where there is a scheme, to achieve the scheme.

COURT'S ASSESSMENT

[28] It is then for the court to decide, based on that evidence, whether it considers the proposal likely to achieve survival and/or better realisation or, where there is a scheme, to achieve the scheme, on a case by case basis. The court should not concern itself with how the creditors might vote — that is a decision for the creditors.

SECURED CREDITORS

[29] I turn now the position of secured creditors in the judicial management process. Unlike unsecured creditors, secured creditors are entitled to appear to oppose the application; and where a secured creditor opposes the application, the court shall dismiss the application (s 409 of the CA):

> 409 Dismissal of application for judicial management order
>
> Subject to sub-s 405(5), the court shall dismiss an application for a judicial management order if it is satisfied that —
>
> (a) ... ; or
>
> (b) the making of the order is opposed by a secured creditor.

[30] It is mandatory. It matters not if the majority in value of the secured creditors do not oppose the application and/or if the applicant has met the requisite criteria.

A PUBLIC INTEREST EXCEPTION

[31] There is, however, one exception where the court may still make a judicial management order notwithstanding that the applicant has failed to meet the requisite criteria and/or a secured creditor opposes the application; that is when the court considers that public interest so requires that the judicial management order be made (s 405(5)(a) of the CA):

> 405 Power of court to make a judicial management order and appoint a judicial manager
>
> (5) Nothing in this section shall preclude a court —
>
> (a) from making a judicial management order and appointing a judicial manager if the court considers the public interest so requires; or
>
> (b) ...

[32] Given the implication of public interest in this context — it overrides all the checks and balance for the granting of a judicial management order — public interest is to be interpreted restrictively and should only apply in the most exceptional of circumstances. Generic reasons associated with wound up companies such as loss of employment, uncompleted contracts, etc do not fall within the meaning of public interest.

[33] If I may be permitted to illustrate 'exceptional' by way of a hypothetical example of what I would consider as public interest. As our nation, and indeed the world, struggles to contain the COVID-19 pandemic, if a company who alone possesses the vaccine for the virus makes an application for a judicial management order, the court may in such exceptional circumstances consider that public interest requires that the judicial management order be made.

G MAYBANK'S OBJECTION

[34] In this case, Maybank, a secured creditor, is appearing to oppose the application. This means that the court must dismiss the application unless it considers that public interest requires that the judicial management order be made. It matters not that Maybank's debt is significantly less than the other secured creditors.

NO PUBLIC INTEREST

[35] The 'public interest' alleged by the applicant pertain to the loss of employment, uncompleted contracts, etc. These consequences are generic to wound up companies and is far from being public interest. The fact is that employees can seek new employment and other geotechnical contractors can step in and complete their uncompleted contracts.

[36] There is nothing special about the applicant such that public interest requires the judicial management order to be made. On this ground alone, the application should be dismissed.

THRESHOLD FOR INSOLVENCY

[37] As for the application proper, the applicant has submitted that they are in financial distress, are no longer able to pay their debts and are embroiled in numerous litigation proceedings.

[38] They recorded a net financial loss of RM167,169,637 for the financial year ended 31 March 2019.

[39] According to the draft indicative term sheet (exh BMSB29), as at 30 September 2019, their current liabilities consists total owing to secured creditors of RM51,589,275.30, hire purchase financiers RM1,098,005.28 and unsecured creditors RM121,235,914.76.

[40] According to their affidavit at paras 22–24, as at 30 September 2019, their current assets consists trade receivables and retention sum receivables of RM29,025,136.15, bank balance RM1,277,558.19 and short term deposits RM7,814,798.97 (pledged as security). This falls far short of their liabilities. In addition, they have also issued post-dated cheques totalling RM5,419,558.58 that they are unable to honour.

[41] Maybank does not dispute that the applicant is insolvent. The court, too, is satisfied that that the company is insolvent.

APPLICANT'S EVIDENCE FOR SURVIVAL AND/OR BETTER REALISATION

[42] I turn now to the issue of whether a judicial management order will likely achieve survival and/or better realisation. The material part of the applicant's supporting affidavit pertaining to the viability of the scheme ie the proposal are found at paras 30–39 thereof with reference to three exhibits:

(a) Vizione Bhd's ('Vizione') 2019 annual report (exh BMSB27);

(b) Vizione's letter of intent dated 14 November 2019 (exh BMSB28); and

(c) draft indicative term sheet of the proposed scheme (exh BMSB29 at pp 1239–1247).

APPLICANT'S SUBMISSIONS

[43] The applicant's submissions pertaining to the viability of the scheme ie the proposal is found at paras 48–52 of the applicant's written submissions. This is all that they had to say:

> 48 ... the applicant's financial advisor, Ernst & Young ('EY") has identified Vizione Bhd ('Vizione'), as a potential white knight which has expressed its interest to acquire 100% of the applicant's shareholdings.
>
> 49 Against that backdrop, EY has conceived and prepared a proposed scheme of arrangement which lays out a proposed debt restructuring scheme upon the successful acquisition by Vizione ('proposed scheme of arrangement').
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> 50 In brief, Vizione is a construction company listed on Bursa Malaysia with a revenue of RM594m, profit before tax of RM86m and RM521m shareholders' funds for the financial year ended 2019. Further, the order book has 16 contracts worth RM2.97 billion.
>
> 51 It is further submitted that upon the successful acquisition of the applicant by Vizione as well is after the implementation of the proposed scheme of arrangement, the applicant will be able to pay all its creditors pursuant to the scheme.
>
> 52 As such counsel submits that the above is sufficient to establish that the applicant's survival is irrefutable and/or the applicant to continue its operations for the foreseeable future upon the grant of the JM order by the honourable court.

SURVIVAL AND BETTER REALISATION

[44] The applicant's counsel confirmed in oral submission that they would not be proceeding on the scheme limb, as the creditor's approval under s 420 of the CA would suffice; and that the basis of their application rest solely on the survival limb, which means that the applicant may be experiencing temporary insolvency but, with this proposal, will be able to meet their obligations in full.

[45] I think that they are misconceived as the applicant have at the same time stated that they are not be able to meet their financial obligations in full and sought a huge haircut from the secured creditors (forego at least 50%) and an even bigger haircut from the unsecured creditors (forego 90%). I am giving them the benefit of the doubt and assume that their application is premised on a blend of better realisation and survival ('goals'). If not, their application would be a non-starter.

FINDINGS

[46] Even then, I find that the applicant have come up short in their evidence to support the application for a judicial management order for a number of reasons.

NO EXPERT EVIDENCE

[47] The nominated judicial manager, a partner of the Ernst & Young, has not affirmed an affidavit to support the application. There was thus no satisfactory explanation on the rationale of the proposal and how it would achieve the goals. Without his expert opinion and verification of the material issues, and ultimately without his expert opinion that he considers the proposal is likely to achieve the goals ('expert opinion'), there is nothing credible before the court for it to even consider that the proposal is likely to achieve its goals.

[48] The applicant, whose material averments are premised on the nominated judicial manager's advice, have not exhibited any document comprising the expert opinion. As such, they lack credibility. Even the pre-conditions for making the application — that the applicant consider there is a reasonable probability of achieving the goals — is in question.

WHAT IS THE PROPOSAL?

[49] The applicant have not put forth a tangible proposal ('exh BMSB29'). All that was appended to support the proposal was the white knight's (Vizione) letter of intent ('exh BMSB28') and a draft indicative term sheet. They were both vague, speculative and scant on details.

[50] Vizione' letter did not even indicate the capital injection that they were prepared to make.

[51] The draft indicative term sheet was not even dated or signed off by nominated judicial manager (or anybody for that matter). Even then, they were more concerned with the restructuring of the debt — which basically means diminishing the creditors' rightful entitlements in terms of quantum time and terms of payment — than better realisation to improve the creditors' lot, which is what the court is really concerned with.

[52] The terms of the better realisation estimated that, in the event the applicant is wound up, the unsecured creditors only stood to recover 2.61% of their debts totalling RM121,235,914.76, the hire purchase creditors only stood to recover 19.9% of their debts totalling RM1,098,005.28 and that the three secured creditors only stood to recover the following percentages of their respective debts: HSBC 29.3%, OCBC 32.8% and MBB 19.4%, totalling RM51,589,275.30.

[53] Whereas, if the creditors supported the proposal, the unsecured creditors would stand to recover at least 10% of the debt with the proposal — that is about four times more than if the company were to be wound up, the

A hire purchase creditors would stand to recover at least 80% of their debts — that is about four times more than if the company were to be wound up — and the secured creditors would stand to receive at least 50% of the debt with the proposal — that is about between 50% to 150% more than if the company were to be wound up (para 39.6 of the supporting affidavit).

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[54] Unfortunately, the figures quoted were not substantiated or verified. There was no satisfactory explanation of the rationale of the proposal and how the proposal would achieve better realisation. In particular, I find it quite disconcerting that the applicant were able to surmise such luring figures for
C better realisation when Vizione have not even indicated the capital injection that they are prepared to make.

CONCLUSION BASED ON EVIDENCE

D **[55]** Given that the applicant is the company itself — thus having full access to all relevant information and having appointed Ernst & Young to advise them — much more is expected of them and should have been done before an application is made. In these circumstances, the evidence adduced fell far short of what it would take to persuade this court to:

E *consider(s)* that the making of the order would be *likely to achieve* one or more of the following purposes:

(i) the survival of the company, or the whole or part of its undertaking as a going concern ('survival');

F (ii) ...

(iii) a more advantageous realisation of the company's assets would be effected than on a winding up ('better realisation').

G DECISION

[56] For the above reasons, I dismiss the application.

Application dismissed.

H Reported by Nabilah Syahida Abdullah Salleh

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